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No. 88-1921

In The

Supreme Court of the United States

October Term, 1988

FRANK MORGAN,

Petitioner,

versus

DENNIS WHITT, individually and in his official capacity, and THE TOWN OF LAKE PARK, FLORIDA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT, TOWN OF LAKE PARK, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether an allegedly defamatory statement made by a town manager in the course of an inquiry into the public background of a public figure in another state is an action taken "under color of" law when the inquiry is a private one, not connected with the town manager's official duties, and when the manager is accompanied by an off-duty police officer from his town who plays no part in the inquiry.

II. A. Whether this Court should review a decision of a Court of Appeals which found that there was no actual malice proven in respect to allegedly defamatory statements made regarding a public figure when the record discloses that there was no proof that the statements were false or known to be false.

B. Whether this Court should review a decision made by the Trial Court that the Petitioner was a general purpose public figure when that ruling was not objected to or appealed below.

III. Whether the actions of a town manager, taken in respect to a matter which has no connection with a municipal interest and taken without any municipal authority, can be termed a municipal policy under 42 U.S.C. § 1983.

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I. STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

This Respondent agrees with the statement of grounds for jurisdiction provided in Petitioner's Petition, but would suggest that jurisdiction should not be granted.

II. COUNTERSTATEMENT OF THE FACTS

The Petitioner, Frank Morgan, was a former resident of Pennsylvania who retired in 1976, after a career in which he held or sought various political offices in or about Schwenksville, Pennsylvania, including the office of mayor of that town (R5 - 127, 154). In 1978, Morgan moved to Lake Park, Florida, and became involved in the local politics of the community, serving as a member of the Town Planning and Zoning Board and the Merit Board and as a political operative, soliciting other members of the community to run for town office and supporting, organizing and running their campaigns (R5 - 151, 163-164, 134-138).

Lloyd Denver Whitt was Town Manager of the Town of Lake Park from February 17, 1982 until 1986 (R5 - 31; R7 - 488). Whitt and Morgan first met in March or April, 1982, when Morgan was campaigning for a mayoral candidate (R5 - 34-5); approximately a year later, they entered into a political feud which lasted until Whitt left office (R5 - 35). During the next several years, Morgan worked to elect Town Commissioners whom he felt would fire Whitt (R5 - 35, 134-138); accused Whitt of taking kickbacks on purchase of police furniture[1], and criticized him for the adoption of new personnel rules for the Town's employees (R5 - 128, 143). Whitt, in turn, ordered Morgan out of his office on at least on one occasion (R5 - 38).

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[1] An accusation which was the subject of a special investigation that totally exonerated Whitt; Morgan subsequently acknowledged that Whitt has been exonerated (R5 - 168).

Morgan resigned from both of his municipal board positions in January 1984 (R5 - 151). Municipal elections were scheduled for March, 1985, and Morgan actively supported and ran the campaigns of several candidates (R5 - 139; R6 - 320, 339). At the invitation of the editor of a local weekly newspaper – Weekday – Morgan wrote a weekly political column which began appearing in the paper on January 16, 1985 (R5 - 43; R5 - 138-9). The first article, which was critical of Whitt, compared his administration to that of Nazi Germany (R5 - 145). Morgan claimed expertise as a critic of the local administration predicated upon his background as a public official in Pennsylvania (R6 - 447).

In early 1985, the police department in Lake Park undertook the investigation of an employee who was suspected of having submitted false information on an employment application; some evidence indicated that one or more of her superiors had knowledge of the fact that the application contained false information, but had nonetheless approved the application (R5 - 49-51; R6 - 195; R6 - 444). Whitt, whose duties included administrative investigations of employment matters, scheduled a trip to Auburn, New York to determine whether any police department official had previously obtained information of the falsified records, but had suppressed it; he was originally scheduled to be accompanied by the Police Chief, who was concurrently conducting a criminal investigation into the employee's conduct in falsifying the employment application (R5 - 92; R6 - 445). At the last moment, the Chief substituted Sergeant James Tice in his stead; it was to be Tice's function to obtain information

for the possible criminal prosecution of the subject employee (R6 - 445).[2]

When Whitt learned that all flights to Syracuse (the closest airport to Auburn, New York), from West Palm Beach were routed through connections at Philadelphia, he developed the idea of taking the opportunity to make a side trip from Philadelphia to Schwenksville on the way to Syracuse in order to look into Morgan's background as a public official in Pennsylvania (R5 - 47; R6 - 446). His admitted purpose in such a side trip was to learn the true facts regarding the administrative and political expertise that Morgan represented himself as having, and to learn anything of Morgan's political or public background in Pennsylvania which might support a public riposte to Morgan in answer to the charges that the latter had been making against him (R5 - 47).

Whitt called in advance to see if the town of Schwenksville had public records available (R5 - 63). He and Tice left West Palm Beach on January 30, 1985, flew to Philadelphia, rented a car, and drove the following morning to Schwenksville. There they ate at a diner where they had occasion to ask two young men for directions and were directed to the Collegeville Independent newspaper in an adjoining community (R5 - 56-7; R5 - 60). They

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[2] Petitioner suggests in his Petition that this trip was a mere subterfuge to enable Whitt to go to Pennsylvania (Petition, p. 2, 49). This suggestion was raised for the first time on appeal. It was Petitioner's position at trial that it was a legitimate trip – as, indeed, the evidence clearly established. Petitioner's trial counsel stated this unequivocally on opening statement (R5 - 10).

stopped at the newspaper and Whitt asked if back copies of the newspaper were available; he was advised by an office worker, Lynn Nyce, and a columnist, J. Howard Fenstermacker, that the newspaper's file copies were not available except upon permission of the owner, who was on vacation (R5 - 61-2; R6 - 209; R6 - 242). There was some disagreement as to what was said in the course of the 15-20 minute visit; Whitt, Tice (who testified at trial on behalf of the Plaintiff, Morgan) and Fenstermacker all testified that nothing substantively was said in regard to Morgan's character or honesty (R5 - 109; R5 - 122; R6 - 237). Nyce testified that Whitt referred to arson in respect to the purported burning of a trailer owned by Morgan in Pennsylvania, although she did not claim that Whitt accused Morgan of responsibility in the burning (R6 - 210).

Tice and Whitt left the Independent – whose owner, as it developed, was a close friend of Morgan – without Whitt's having viewed the newspaper's file copies (R5 - 61). They spent several hours in Schwenksville, where Whitt spoke to several town officials and the editor of the Schwenksville Item, a newspaper which had opposed Morgan when he was politically active in Pennsylvania politics (R5 - 59-60; R6 - 272-293; R6 - 272-315; R6 - 390-433). Although the Township's official records were made available to Whitt, they were not reviewed; most of the attention was given to reviewing the back file copies of the Item (R6 - 377-379). None of the information sought or obtained by Whitt was outside the public record (R5 - 159-160).

Whitt and Tice then proceeded back to Philadelphia, spent the night, and continued their trip on to Syracuse

and Auburn, New York where they completed their respective investigations and returned to West Palm Beach (R5 - 56-7).

Following Whitt's return, Morgan was contacted by his friend who owned the Collegeville Independent, and told of Whitt's visit (R5 - 130). On February 6, 1985, in his weekly column, Morgan attacked Whitt for inquiring into his political career and background in Pennsylvania, and challenged him to publish the information which he had acquired (R5 - 147-148; R5 - 157; R5 - 161). In response, Whitt complied with the challenge in a column which he wrote in the same newspaper – Weekday (R6 - 452). The Town Commission reacted with disapproval of the rivalry between Whitt and Morgan and requested Whitt to discontinue his column – which he did (R6 - 452-453). Morgan, however, continued writing his column on a weekly basis through the March municipal elections; his last column that year was published in April (R5 - 133; R6 - 453).

Subsequent to this, Morgan remained politically active in the Town of Lake Park, supporting various candidates, including his daughter, for the Town Commission and actively assisting in the campaigns in August of 1985 and March 1986 (R5 - 134-137; R5 - 163-164). During the 1986 campaign, he again published his weekly column (R5 - 139).

Morgan claimed that, as a result of Whitt's inquiry into his political past in Pennsylvania, he became highly

fearful, expecting Whitt to arrest him or bomb his house (R5 - 139).[3]

Several specific factual representations made by the Petitioner bear careful review since they do not accurately reflect the record.

The Petitioner contends that the Town of Lake Park paid for the expenses of Whitt's side trip to Schwenksville (Pet. p. 2, 48, 53). In fact, the record discloses that Whitt carefully paid all of the additional expenses attributable to the detour to Schwenksville of which he – or anyone else connected with the Town – had any knowledge (R6 - 447, 515, 356, 326). He paid the motel expenses incurred by Tice and him; he paid for the rental car they used, and for their meals; he and Tice took personal leave for the two days involved in the side trip (R6 - 447, 513-515). The only expense not paid by Whitt was the difference in airfare caused by taking a layover in Philadelphia rather than simply changing planes. This additional expense was not known until testified to in pretrial discovery by an airline representative (R6 - 515; R6 - 179-181).

The Petitioner also contends that the Town Commission knew of the proposed trip to Schwenksville (Pet. p. 3, 44). This was based on Tice's testimony that Whitt had told him the "Commissioners" knew of the trip; on further inquiry, Tice admitted that Whitt did not specify whether he was referring to the official trip to Auburn, New York, or to the side trip to Schwenksville (R5 - 114). The two commissioners who testified at trial both denied

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[3] Whitt had no arrest powers (R6 – 435).

any prior knowledge of any detour to Schwenksville, and their testimony was not challenged or contradicted (R6 - 322; R6 - 351). Whitt, himself, testified that he only assumed that the Commission members knew he was going on the trip (R5 - 48).

The Petitioner contends that Whitt represented himself to be on official business in Schwenksville when he spoke to the various individuals he met, and that Tice acted – on Whitt's instructions – as though he were on a police investigation, frequently displaying his badge (Pet. p. 15-16). In fact, the testimony of Whitt, Tice and the persons they were in contact with in Pennsylvania were in close agreement that there was never any representation made of official business or an official investigation; that Tice played no role in any of the inquiries, and was merely "along for the ride", and that Tice only showed identification on two or three occasions – and then only when requested by the party Whitt was addressing. Since the Petitioner makes various unfounded assertions regarding what was said or done by Whitt and by Tice in Pennsylvania, a brief review of each witness's testimony is useful in correcting the false impression given by Petitioner.

Tice testified that he never heard Whitt make any derogatory comments about Morgan (R5 - 122); that he was not in Pennsylvania on official business, and never told anyone in Pennsylvania that he was on official business (R6 - 191-192; R6 - 194); that he carried his police identification with him for his work in New York, and showed it in Pennsylvania only when specifically asked by a third party (R6 - 194-195); although Whitt made no derogatory comments about Morgan, one of the young

men in the Schwenksville diner referred to Morgan as a "crook" (R5 - 122).

Fenstermacker testified he was present the entire time Whitt was at the Independent (R6 - 246); neither Whitt nor Tice accused Morgan of any criminal activity (R6 - 237-246); Whitt asked if he knew Morgan and indicated that he was looking into Morgan's background (R6 - 233-234, R6 - 236).

Gary Bell (one of the two young men at the diner) testified that Whitt and Tice approached him and asked for directions (R6 - 262); they also casually asked if he knew Morgan or knew where they could find information on him (R6 - 263); neither Whitt nor Tice called Morgan a crook or made any reference to criminal misconduct by Morgan (R6 - 266-268).

Ronald Hacker (the other young man spoken to at the diner) testified that he and Bell originally thought Whitt and Tice were newspaper reporters since they did not identify themselves at first; later one showed him an identification ID card or badge (R6 - 253, 262); neither Whitt nor Tice mentioned the purpose of their trip (R6 - 251); he recalled and mentioned to Whitt that a fire had burned down a place owned by Morgan in Pennsylvania (R6 - 256); he believed that Bell mentioned something about a trailer fire (R6 - 257).

Clarence Grimly, borough superintendent in Schwenksville, was told that Whitt wanted background information on Morgan and was going to examine Town records (R6 - 275). No one ever referred to Whitt or Tice's actions as an investigation, and there was no mention of criminal conduct or investigation (R6 - 276, 278); neither

Whitt nor Tice made any representation that they were conducting a police investigation (R6 - 281); Whitt gave him a business card but Tice showed him no badge or ID (R6 - 282); Whitt specifically advised Grimly that he was there in a personal rather than a business capacity (R6 - 282); Whitt never accused Morgan of any criminal actions (R6 - 292), and, while Whitt may have said that he would have liked to lock Morgan up, this was a desire held by many people in Schwenksville who knew Morgan (R6 - 282-283).

Richard Schlick, mayor of Schwenksville, testified that Whitt asked if public records were open and available and was told they were; Whitt said he was looking for background information but made no claim that he was on a criminal investigation (R6 - 295); Whitt gave him a card and Tice mentioned that he was a police sergeant, but showed no ID (R6 - 299, 302).

Francis Kuhn, the police chief of Schwenksville, testified that he spoke with Whitt who was with another man (R6 - 372); Tice showed no ID or badge (R6 - 373); Whitt told him that he and Tice were en route to New York and were making a side trip to Schwenksville (R6 - 374); Whitt asked him about Morgan – Kuhn had been police chief when Morgan was mayor – but did not say he was investigating Morgan (R6 - 374-375); Whitt told him that they were not in Pennsylvania on official business (R6 - 379), and that he was paying for that part of the trip personally (R6 - 378); Whitt never accused Morgan of criminal activity (R6 - 387).

Bruce MacBain, owner of the Schwenksville Item, testified that he met Whitt in Schwenksville and asked

both Whitt and Tice to show him identification (R6 - 396); Whitt told him they were on their way to New York on another matter and were taking the day off (R6 - 397); Whitt told him he was looking into Morgan's background, but did not say or give the impression it was a criminal investigation (R6 - 400); since MacBain was a newspaperman, he specifically asked if this was a criminal investigation, and Whitt replied it was not; when asked who was paying for the trip, Whitt advised him that the Town was not paying for the side trip to Pennsylvania (R6 - 429, 431-432).

Lynn Nyce, the office worker at the Collegeville Independent when Whitt visited in 1985, and now the editor, testified that Whitt asked for back issues of the paper to find information on Morgan (R6 - 206, 209). She testified that Tice introduced himself and showed her a badge, but did not say whether he did it upon request, as he testified, or without request (R6 - 208); she said Whitt spoke of some of Morgan's property burning mysteriously and mentioned arson – but she did not testify that Whitt accused Morgan of the arson (R6 - 210); she further said that Whitt said he was going to get information which would put Morgan in jail (R6 - 210). Nyce, whose testimony provided almost the sole basis of the Petitioner's claim, never testified that Whitt or Tice represented that the trip was an official one, or that it was a criminal or administrative investigation being conducted on behalf of the Town.

Finally, the Petitioner indicates that the former police chief of Lake Park, Donald Riccardi, testified that Whitt

had "suggested" that he dig up some dirt on Morgan and let Morgan know that he had it (Pet. p. 44). Morgan cites this to suggest that Whitt had been attempting to use his office to harass Morgan over a period of years. In fact, Riccardi testified that he came to Whitt complaining that Morgan was becoming a "pain in the neck" to him and the police department with his constant complaints. Whitt, according to Riccardi (who was a friend of Morgan's and a political opponent of Whitt) suggested that the way Riccardi could get Morgan off his back was to uncover information on him and threaten to use it (R5 - 81-82). Whitt denied this discussion, but, even if it occurred, it was clear from Riccardi's testimony that Whitt was not asking Riccardi to do this for Whitt; rather, Whitt was casually suggesting it as a tactic Riccardi could use if he (Riccardi) felt sufficiently troubled by Morgan. At the time of the alleged discussion (early 1983), it does not appear that there had as yet developed any ill will between Whitt and Morgan.

III. REASONS FOR DENYING THE PETITION

Review by Certiorari is not a matter of right, but of judicial discretion. It should be granted only when there are special and important reasons for doing so. Sup.Ct.R. 17.1. The Petition presents no basis for such review. On the contrary, the decision below was correct and should not be disturbed.

A.

THE DECISION BELOW PROPERLY HELD THAT THE ACTIONS OF DENNIS WHITT WERE NOT TAKEN "UNDER COLOR OF" LAW WHERE THERE WAS NO SHOWING THAT HE ACTED IN CONCERT WITH THE POLICE OFFICER WHO ACCOMPANIED HIM AS A BYSTANDER, AND WHERE HE DID NOT ACT TO DEPRIVE PETITIONER OF HIS CONSTITUTIONAL RIGHTS THROUGH THE POWER OF HIS OFFICE.

The Petitioner contends that the Eleventh Circuit's reversal of the judgment below upon the basis that Dennis Whitt was not acting "under the color of" state law conflicts with established case law on two counts: first, that Whitt acted in concert with James Tice, a police sergeant, and, second, that Whitt availed himself of the powers of his office to deny the Petitioner his constitutional rights. A proper review of the factual support for each of these contentions, considered together with the case law relied upon, shows that the Eleventh Circuit's decision was in accordance with existing authorities. Review should, consequently, be denied.

The Petitioner contends that Whitt acted in concert with Tice, relying upon Tice's authority as a police officer to effectuate a deprivation of Petitioner's constitutional rights. In fact, the evidence established the opposite. No witness, including Lynn Nyce, testified that Sergeant Tice participated in any way in Whitt's discussions and inquiries. Tice, himself, testified that Whitt advised everyone he spoke with that Tice had nothing to do with his inquiries, and that he was just "along for the ride" (R6 - 196).[4] Tice testified that he did show his police ID card,

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[4] Tice testified as Petitioner's witness.

but only when he was asked to do so by the person Whitt was talking with; he never volunteered his ID (R6 - 195). The only witnesses who testified that Tice showed his ID were MacBain, Hacker and Nyce. MacBain's testimony accorded with Tice's that Tice showed him identification only when MacBain asked to see it (supra pp. 10-11). Hacker testified that neither Whitt nor Tice identified themselves at first, leading him to think they were newsmen; one later showed him an ID. Hacker does not mention whether the ID was shown at Tice's initiative or upon the request of Hacker (supra p. 9). Nyce also testified that Tice showed her an ID or a badge, but does not say whether it was upon a request or upon Tice's initiative (supra p. 11). Thus the uncontradicted evidence established that, while Tice may have shown an ID on 3 occasions, it was done only when the person being addressed asked him for some identification. A number of witnesses confirmed that Tice played no role in the inquires, and testified that they were told that he was not involved in the inquiry (supra pp. 9-11). It was never contended by the Petitioner that Tice had any authority which could be exercised in Pennsylvania. In the cases relied upon by the Petitioner, persons acting in concert with police officers, who were themselves acting with the authority of their office, were found to be acting "under color of" state law. That situation is quite different from the case here where Tice played no role in the inquiry, and was only "along for the ride"; where his role – or, more properly, lack of role – was explained to the people who were approached; where he showed his ID only for identification purposes to those who requested identification, and where he had no real or pretended authority.

In *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), an off-duty policeman serving as a security guard arrested a complainant for shoplifting; his acts were imputed to his employer since there was evidence that, even though he was "off-duty", he acted with his official arrest powers. In *Booker v. City of Atlanta*, 776 F.2d 272 (11th Cir. 1985), summary judgment for the defendant was reversed because there was some evidence to indicate that he was accompanied by a police officer acting within his jurisdiction in attempting to effect repossession of a car. In *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986), a guardian ad litem was held to have acted under color of state law because he acted in concert with state officials who confined the plaintiff in a hospital. Finally, in *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), the Court held that involvement by police, who accompanied a landlord in an eviction matter, was so great that the eviction had crossed the line between a private action and a state action, and held the landlord to have been acting in concert with the police.

In each of these cases, the police officer, or other official with whom the private citizen was held to be acting in concert, was actively involved in the undertaking (in some cases as the primary party) and was acting within the scope of his jurisdiction and power. Neither situation pertained to the present cause.

The Petitioner also contends that Whitt availed himself of the powers of his office in allegedly denying him his constitutional rights. The deprivation of rights complained of by Morgan was the alleged loss of liberty interest in his reputation caused by Whitt's comments in Pennsylvania in the course of his inquiries into the public

background of Morgan. The Petitioner fails to demonstrate how Whitt was enabled to accomplish this alleged deprivation by virtue of the power of his office. Whitt did not seek records or information which were not open and public matters. There was no evidence that he was able to make the comments that he was alleged to have made or to endow them with any effect by virtue of his being a Town Manager in Lake Park, Florida.

The cases relied upon by the Petitioner do not support his position. In *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987) (*en banc*) the action taken "under color of" state law was the act of entrusting a marked sheriff's car to a jail trustee, enabling him to stop and assault the decedent. There was no question that the act of entrustment was an official act by the sheriff pertaining to his office. In *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1984) (*en banc*), the action taken "under color of" state law was the assessment and computation of a prisoner's term by two prison records officers at the request of the warden. In *Howell v. Tanner*, 650 F.2d 610 (5th Cir. 1981) the action of a game officer who stopped the Plaintiff and assaulted him were held to be "under color of" state law where the officer was in uniform, had his official vehicle and stopped the Plaintiff on property controlled by the game department. In *Harper v. Merckle*, 638 F.2d 848 (5th Cir. 1981) the actions of a judge acting in excess of his jurisdictional authority in having a Plaintiff incarcerated were held to be under color of law. There, although the judge exceeded his authority, the actions taken were ones which, if taken with proper jurisdiction, would have had the force of law. In *Howard Gault Co. v. Texas Rural Legal Aid*, 848 F.2d 544 (5th Cir. 1988), various state officials

acted in concert with a grower's association giving the latter aid within the state legal processes. These actions were held to be under color of law.

In contrast to the cited cases, the evidence here did not show that Whitt represented himself as acting in an official capacity; he undertook no actions injuring the Plaintiff which he was enabled to undertake by the fact that he was a Town Manager, and the evidence from most of the witnesses was that Whitt expressly disclaimed acting in any official capacity. Those witnesses who did not testify that he disclaimed acting with authority gave no testimony on that subject at all. The evidence established that Whitt had no authority to conduct an investigation of Morgan since his only investigatory powers were in reference to municipal employees or officials, and Morgan was not a municipal official or employee. Since Whitt's interest and statements in respect to Morgan solely related to Morgan's political activities in Pennsylvania, there was not even a color or appearance of official authority lent to his actions as a Town Manager in Florida.

B.

THE DECISION BELOW PROPERLY HELD THAT THE JUDGMENT UPON THE DEFAMATION COUNT SHOULD BE REVERSED.

(1)

THERE WAS NO SHOWING THAT THE STATEMENTS ALLEGEDLY MADE WERE FALSE OR THAT WHITT KNEW THEY WERE FALSE.

The Petitioner attempts, by his second argument, to shoehorn the present case into one side of a purported

conflict between circuits upon the issue of the independent assessment of evidence of actual malice prescribed in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 104 S.Ct. 1949 (1984). This effort is ill-taken. The Petitioner contends that the Eleventh Circuit, below, applied the broad interpretation of de novo review suggested in *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) (*en banc*), to include appellate review of the credibility findings made by a jury in a defamation action brought by a public official or public figure. In fact, the Circuit Court below gave no indication that it reviewed the jury's decisions on witness credibility on the defamation claim.

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964), established the rule that, in defamation suits brought by public officials, the plaintiff could prevail only upon a showing of actual malice . . . i.e. a showing that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. Proof of this actual malice must be made by clear and convincing evidence. The Sullivan doctrine was extended to public figures in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974). In *Bose*, this Court held that appellate courts must engage in an independent assessment of the evidence "germane to the actual-malice determination" *id.* 466 U.S. at 514, 104 S.Ct. at 1967. This Court further held in *Bose* that

> The burden of proving "actual malice" requires the Plaintiff to demonstrate with clear and convincing evidence that the Defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.

id. 466 U.S. at 511, 104 S.Ct. at 1949 (ftn. 30).

This formula recognizes that the Plaintiff has the burden to show that the statement is 1) false, and 2) uttered with knowledge of its falsity or with serious doubt as to its truth.

The record below was completely silent on the matter of whether any of the statements purportedly made by Whitt were true or false; it was equally silent on Whitt's subjective knowledge either by direct or circumstantial evidence. The Petitioner claims that Whitt accused him of arson committed on his property in Pennsylvania, and said that he wanted to "lock him up". In fact, testimony of comments about arson or about Morgan's property burning came from only two witnesses: Lynn Nyce and Donald Hacker. Nyce testified that Whitt remarked that some of Morgan's property burned, and mentioned arson (R6 - 210). She never testified that Whitt accused Morgan of the arson, and she never testified that arson did not occur with respect to Morgan's property. Hacker testified that he told Whitt that some of Morgan's property in Pennsylvania had burned, and that either his friend, Gary Bell, or Whitt mentioned something about a trailer burning (R6 - 256-257). In respect to neither incident was arson discussed in the conversation with Bell and Hacker.

Finally, Morgan's testimony about this point – which point was the linch-pin of his suit – was totally silent. He neither confirmed nor denied that he had property in Pennsylvania which burned (as a result of arson or otherwise), and he produced no evidence in any other form that would indicate that Whitt's alleged statement, testified to by Nyce, was false.

Not only did Morgan fail to establish that the alleged statement was false (or even defamatory, since it was never shown that the accusation of arson, even if made by Whitt, was directed at Morgan), but he likewise failed to put on any evidence of Whitt's subjective knowledge of the truth or falsity of the statement.

Similarly, Whitt's alleged comment regarding his wish to "lock up" Morgan was not a statement of substance or fact, but only an indication of a desire or a fond hope. As such it is not defamatory under Florida law. See *From v. Tallahassee Democrat, Inc.*, 400 So.2d 52 (Fla. 1st DCA 1981).

Even had the Eleventh Circuit applied a "clearly erroneous" standard of review without an independent assessment of the evidence of actual malice, a reversal would have been mandated, for the record was totally void of any evidence to support this critical and essential element in the Petitioner's case. *A fortiori* a reversal would also have been mandated under the independent assessment rule prescribed in *Bose*.

(2)

THE PETITIONER DID NOT COMPLAIN BELOW OF HIS CHARACTERIZATION AS A GENERAL PURPOSE PUBLIC FIGURE AND SHOULD NOT BE ALLOWED TO RAISE IT FOR THE FIRST TIME IN THIS COURT.

The Petitioner also contends that the Eleventh Circuit improperly held him to be a general purpose public figure rather than a limited purpose public figure. This contention must fall since the designation of Petitioner as a general purpose public figure was made by the Trial

Court without objection from the Petitioner, and was not appealed by the Petitioner (R6 - 474). In short, it is an issue complained of for the first time in this litigation in the Petition for Certiorari. On this ground review should be denied. *FTC v. Grolier, Inc.*, 462 U.S. 19 at 23, 103 S.Ct. 2209 at 2212 (1983).

C.

THE DECISION BELOW CORRECTLY HELD THAT WHITT'S ACTIONS DID NOT CONSTITUTE MUNICIPAL POLICY WHERE THERE WAS NO SHOWING THAT THE ACTIONS WERE WITHIN THE AMBIT OF MUNICIPAL INTEREST OR AUTHORITY.

In *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, (1978), this Court held that a municipality could itself be held liable under 42 U.S.C. § 1983 where the action producing the deprivation of Federal Constitutional or statutory rights was taken in implementation of official municipal policy. In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986), this Court held that a single action, when undertaken pursuant to a decision by one who "possesses final authority to establish municipal policy with respect to the action ordered", Id. 106 S.Ct. at 1299, can result in municipal liability since the decision thus made constitutes municipal policy. In *City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988), this Court held that whether a municipal official possesses the requisite final authority to establish municipal policy is a matter of state or municipal law.

The Petitioner argues that the Eleventh Circuit, in the decision below, ignores the holding in *Praprotnik* that state or municipal law determines whether an official

possesses final authority to establish municipal policy. This argument misunderstands the holding below. The Eleventh Circuit did not suggest that the question of whether Whitt possessed final authority to establish municipal policy for the Town of Lake Park was anything but a matter of state and local law. What it did hold was that a municipal policy was not involved.

The Petitioner in his petition – as well as in his briefs to the Eleventh Circuit – has consistently avoided identifying the municipal "policy" which he contends was established by Whitt, the implementation of which allegedly deprived Petitioner of his constitutional rights. He points to Whitt's power over Town personnel, and his power to expend funds on behalf of the Town. These powers, however, are less extensive than the Petitioner contends, and, of more decisive importance, the actions of which he complains were not taken pursuant to any of these powers.

The gravamen of Petitioner's claim was that he was deprived of a liberty interest in his good name by the comments made by Whitt while in Pennsylvania on a personal fact finding inquiry. At the time, the Petitioner was not a municipal employee or official, and the comments and inquiries made by Whitt that allegedly defamed the Petitioner did not concern any action or conduct by the Petitioner as an employee or official of the town of Lake Park. No witness ever testified that Whitt, while in Pennsylvania, claimed to be on an official investigation on behalf of the Town. On the contrary, the majority of the witnesses – and all who gave any testimony upon the subject – testified that Whitt was explicit in advising that he was not undertaking an official investigation (supra pp. 9-11). Similarly, although he was

accompanied by Sgt. Tice, there was no evidence that Tice took any active role; rather, both Tice and a number of those with whom Whitt had contact in Pennsylvania testified that it was made clear that Tice had no role in the inquiry (supra pp. 8-11). Although it developed that the airfare incurred as a result of the day and a half layover in Pennsylvania added almost $200.00 to each ticket, there was no showing that this fact was known to Whitt who otherwise covered personally all of the additional costs added to the trip by the detour in Pennsylvania.[5] Under such circumstances it can hardly be said that Whitt was making a policy decision on behalf of the Town to pay for his additional airfare. More importantly, it was not a policy of municipal assumption of the incremental travel expense which the Petitioner claims resulted in his deprivation. Instead, it was the inquiry into his background in Pennsylvania – an inquiry made only into matters upon the public record – and certain alleged comments in reference to arson in respect to a trailer owned by the Petitioner in Pennsylvania which constituted the conduct identified by the Petitioner as resulting in his deprivation of rights.

The Petitioner analogizes the alleged conduct of Whitt to the action of a city manager who orders the police department to arrest all black persons in a town out of personal vindictiveness. This attempted analogy exposes the essential flaw in the Petitioner's contention

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[5] The Petitioner omits to advise the Court that the Trial Judge ruled that the additional airfare expense was irrelevant to the issue of municipal liability (R6 - 516). The Petitioner never challenged the ruling.

that Whitt was here establishing municipal policy. If reference to the hypothetical town's charter or to state law revealed that the city manager had the final authority to determine arrest policy for the city,[6] then the action, even if unconstitutional, would be an action within the ambit of his authority. It would be an illegal use of legal power. No one would quarrel with the contention that arrest policies are properly the subject matter of municipal interest and, hence, may be properly termed municipal policies. Thus an unconstitutional arrest policy is nonetheless a municipal policy. Slanderous statements made by public officials unconnected to the performance of a municipal duty, on the other hand can hardly be termed matters of municipal policy for the utterance of statements, *without more*, is not a matter of municipal concern. The attempted analogy with the improper use of arrest powers must fall.

The Petitioner's contention that Whitt's conduct became municipal policy by ratification by the Town Commission is totally without merit. The Petitioner did not allege ratification, and no such issue was framed for the jury. It is an argument created and raised initially on appeal. Considered upon its substance, this argument is equally lacking in merit. There was not evidence that the Town Commission, or any of its members, had any knowledge that the side trip to Pennsylvania had cost the Town any incremental expenditure. It can hardly be suggested that the Commission ratified the actions of Whitt

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[6] Of course, in the absence of such final power, even if a manager gave an order and the order was carried out, there would be no municipal liability. *Proprotnik*, supra.

by rendering him financial support when there was no knowledge that any expense was incurred. The further suggestion that the Commission accepted his conduct subsequently without dissent has no support in the record. The *only* evidence of how the Commission viewed the situation between Whitt and Morgan subsequent to the visit to Pennsylvania was the testimony that Whitt was advised of the Commission's displeasure and requested to stop publishing his counter-columns in the local newspaper (R6 - 453).

Under none of the arguments raised by the Petitioner could it be said that Whitt was acting to establish a municipal policy which resulted in deprivation of the Petitioner's constitutional rights. The Petition should be denied on this ground.

IV. CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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